No. 16728

United States Court of Appeals
For the Ninth Circuit

McCRAY MARINE CONSTRUCTION COMPANY, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

R. STUART THOMSON
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Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

JURISDICTION

This is an action based upon breach of contract against the United States of America for an amount less than $10,000, which is conferred upon a United States District Court by the provisions of Title 28 Section 1346, United States Code Annotated. The appellant, A. Walter McCray, is now and was at the time herein mentioned a resident of King County, Washington, doing business at Seattle, Washington, under the name and style of McCray Marine Construction Company.

A motion for summary judgment (R. 11) based upon a stipulation of the parties (R. 23) was filed herein October 8, 1959, upon the ground that plaintiff had failed to exhaust his administrative remedies and the court, accordingly, had no jurisdiction to try and determine the said matter.

After considering oral argument and written briefs, the court rendered an oral decision on October 21, 1959 (R. 11) granting defendant's motion for summary judgment of dismissal.

A written motion to reconsider supported by authorities (R. 15) was filed on October 27, 1959, by plaintiff.

The court signed and filed a memorandum opinion (R. 19) denying plaintiff's motion to reconsider on November 16, 1959.

On November 17, 1959, the court signed an order (R. 27) granting the defendant's motion for summary judgment and ordered the case dismissed with prejudice.

Notice of appeal (R. 28) from said order, together with bond on appeal (R. 29) was filed herein on November 19, 1959, and December 4, 1959, respectively.

Jurisdiction of this court on appeal is invoked under the Act of Congress dated June 25, 1948, Chap. 646, 62 Stat. 929, 28 United States Code Annotated Section 1291.

STATEMENT OF THE CASE

The appellant, also referred to as the Contractor, obtained a contract (Exhibit A) to repair seaplane ramps B an C at the United States Naval Air Station, Whidbey Island, Oak Harbor, Washington, from the United States Navy, hereafter referred to as the appellee or government, on March 28, 1957, for a consideration of $274,000.

Work was commenced in accordance with the contract and subsequently the appellant was delayed 15½ working days because certain substructure inspections had not been timely made by the appellee as required by the contract. The appellee was notified (Ex. B) that damages would result because of the delay from the first day that work was halted. A claim for $8,049.50 (Ex. C) was submitted after work had been resumed to the Resident Officer in Charge of Construction, United States Naval Air Station, Whidbey Island, and this claim was denied (Ex. D) on the grounds that the contract provisions did not allow for payment of such claims. The Officer in Charge of Construction, Thirteenth Naval District, Seattle, Washington, subsequently denied the claim (Ex. E, G) on the same ground. Finally the claim was submitted to the Contracting Officer, Bureau of Yards and Docks, Department of the Navy, Washington, D.C. (Ex. H). The appellant received a letter dated March 31, 1958, from the Contracting Officer (Ex. I) acknowledging receipt of the claim and stated:

> " * * * After careful review of the facts, the Contracting Officer determines that since your claim for increased costs is based upon Government-caused delays, it represents a claim for damages and as such cannot be the subject of compensation under the contract.
>
> "Accordingly, for the foregoing reason, your claim for additional compensation in the amount of $8,049.50 is hereby denied. This is a final decision of the Contracting Officer."

The appellant subsequently filed a complaint (R. 3)

against the appellee for the amount of the claim under the Tucker Act, based on a breach of contract caused by the unreasonable delay in making the inspection.

The appellee answered (R. 6) and alleged, amongst other things not pertinent here, that the court had no jurisdiction over the matter because the appellant had not exhausted his administrative remedies, specifically, in not appealing to the Secretary of the Navy within 30 days from the decision of the Contracting Officer as required by the disputes clause, Section 57 of the contract (Ex. A) relating to disputes of fact.

The jurisdictional question was raised by a motion for summary judgment (R. 11). The court, after considering written briefs and oral arguments, orally granted the appellee's motion for summary judgment (R. 11). A motion to reconsider (R. 15) was filed by the appellant which was denied, and subsequently the court signed the order (R. 27) granting appellee's motion for summary judgment and ordered the case dismissed with prejudice. The decision in this case will determine whether the appellant will have the claim considered on the merits.

SPECIFICATION OF ERROR

The District Court erred in granting appellee's motion for summary judgment and dismissing appellant's complaint.

SUMMARY OF ARGUMENT

I.

The final decision of the Contracting Officer, in a letter dated March 31, 1958 (Ex. I) denied the claim as a matter of law, therefore it was unnecessary to exhaust the administrative remedies, as required for disputes of fact, and relief could be obtained by filing the action directly in District Court. Even if one must exhaust administrative remedies in appealing conclusions of law made by a Contracting Officer, the 30-day period could not be invoked since such applies to decisions on disputes of fact under Section 57 of the contract.

II.

Even assuming that the Contracting Officer's final decision of March 31, 1958, was based on a question of fact and law or solely on a question of law, and that in either alternative, an exhaustion of administrative remedies was required, the claim was for unliquidated damages and as such was outside the jurisdiction of either the Contracting Officer or the Secretary of the Navy, and therefore within the jurisdiction of the appropriate District Court.

ARGUMENT OF THE CASE

I.

Section 57 of the contract (Ex. A), commonly referred to as the "disputes clause," is the section which must be carefully examined in considering this jurisdictional question. The pertinent portion of this clause reads as follows:

> " * * *, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Chief of the Bureau of Yards and Docks, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Chief of the Bureau of Yards and Docks a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Chief of the Bureau of Yards and Docks shall be final and conclusive.* * *."

The above disputes clause applies only to questions of fact as distinguished from matters of law.

The Contracting Officer, in considering a claim presented by a Contractor, which the Contracting Officer is authorized to negotiate, has three alternatives. He may reach his decision based on (1) findings of fact (2) findings of fact and conclusions of law or (3) conclusions of law.

It is clear that an adverse finding of fact under the first alternative will require the Contractor to appeal the decision within 30 days to the Secretary of the Navy, whose decision will be final unless one of the exceptions recited in the disputes clause is encountered.

Ordinarily, the adverse decision of the Contracting Officer will be based on the first or third alternatives, so that the second alternative is mainly an academic question. No cases were found concerning a decision of a Contracting Officer based on both findings of fact and conclusions of law. Since the Contractor would be entitled to have any adverse ruling on a question of law ultimately decided by a court of competent jurisdiction, it would follow that the Contractor should not be required to exhaust his administrative remedies before going into a District Court for relief.

A decision by the Contracting Officer based solely on a matter of law under the third alternative above immediately raises two questions: (1) must the Contractor appeal the decision to the Secretary of the Navy and (2) within what time limit. Since the disputes clause only pertains to disputes involving questions of fact, it would appear that there is nothing in this which would require the Contractor to appeal an adverse holding on a question of law. Even assuming that the courts should still require that the administrative remedies be exhausted, aside from the disputes clause, since Section 57 only refers to questions of fact, the Contractor would not be bound by the 30-day period and could appeal the question of law within a reasonable time. 41 United States Code Annotated Section 322 provides:

> "No government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board."

Since a decision on the administrative level on a question of law is not final but subject to appeal to a District Court or the Court of Claims, it would appear unreasonable to require a Contractor to pursue such costly and time-consuming administrative steps before going into the appropriate court for relief. The mere fact that certain factual issues are subsequently raised in the court where the question of law is being determined, as in the instant case, should not be construed as a breakdown in the administrative process but rather a convenient action within which to settle all unresolved matters, both legal and factual. The courts have followed the above reasoning.

In *Allied Contractors v. United States,* 124 F. Supp. 366, 129 Ct. Cl. 400, the plaintiff entered into a construction contract with the Navy Department whereby plaintiff was to furnish the materials, labor and equipment necessary to perform the work of erecting antenna poles, transmission wire poles, access roads and other miscellaneous work.

The defendant did not follow the sequence of work as set forth in the specifications in that defendant failed to promptly remove the wire from the old poles. This delayed and disrupted the orderly progress of plaintiff's work, resulting in delay and expense to plaintiff.

The plaintiff requested payment by defendant for the extra costs incurred by reason of defendant's failure to follow the sequence of work set forth in the specifications, in the performance of the work required of defendant by the contract. The plaintiff's request for

$1,790 for extra costs on the antenna works is itemized in finding 15. The plaintiff's request for $2,406 was for the rental for the idle time of the caterpillar and roller, due to the failure of defendant to perform its part of the work under the contract, as it should and could have done within a reasonable time.

The defendant paid plaintiff the $1,790 requested for the antenna work by change order "C" dated June 21, 1949, which said in part: "Owing to the following change in the work, namely, revision in plans and procedure of construction by the Government, the contract price, in accordance with article 10 of the contract, is hereby increased by $1,790 * * *." The second item of extra costs of $2,506, the one for which plaintiff now seeks recovery, was denied by letter dated June 27, 1949, "on the grounds that it is in the nature of damages and therefore not compensable (administratively) under the contract."

Both claims were founded on defendant's failure to follow the sequence of work expressly set forth and called for in the specifications. Upon plaintiff's further request for payment it was subsequently denied again by a letter dated August 26, 1949, which stated:

> "In response to your oral inquiry, you are advised that the report from the Public Works Office at the Naval Academy does not indicate that the Government so modified your procedure under the subject contract as to cause additional costs and entitle you to additional compensation. Accordingly, there would appear to be no basis for reversing the Bureau's decision denying your claim for

$2,406 which was communicated to you by the Officer in Charge of Construction on June 27, 1949.

"This is a final decision of the Contracting Officer under Article 16 of the contract."

The plaintiff did not appeal this decision of the Contracting Officer.

The court said in commenting on the case:

"The defendant's other contention is that plaintiff did not exhaust his administrative remedies since it failed to appeal from the contracting officer's denial of its claim, and that decision is final and binding under *United States v. Blair,* 311 U.S. 730, 64 S.Ct. 820, 88 L.Ed. 1039. Under the facts in this case we do not agree. The contracting officer, or his duly authorized representative admitted a change in the plans and procedure of construction and by a change order "C" dated June 21, 1949, paid plaintiff $1,790 as part of the extra expense incurred by reason of such change. Plaintiff's protests were adequate. The remainder of plaintiff's claim amounting to $2,506 was denied by letter dated June 27, 1949, on the ground that it was a claim for unliquidated damages for breach of contract, notwithstanding the fact that both of plaintiff's claims for $1,790 and $2,506 were founded on defendant's failure to follow the sequence of work set forth in the specifications. The letter dated August 26, 1949, upon which defendant relies, refers to the June 27, 1949 letter and appears to be no more than an affirmation of that decision which clearly was not decided on a question of fact. No findings of fact were made by the contracting officer. Even if the August letter is considered by itself the most that can be said for defendant is that

it is ambiguous. Certainly if the contracting officer's decision is to be accorded finality it should be unequivocal and clear enough to appraise plaintiff of whether it was based on a question of fact or law so that plaintiff can reasonably determine whether an appeal is warranted. When the decision is ambiguous, as the August letter is, we must look to the surrounding circumstances to determine its meaning. In so doing we conclude that the contracting officer's decision was based on a question of law and, therefore, it was unnecessary for plaintiff to take an appeal therefrom. *Southeastern Oil Florida Inc. v. United States,* 127 Ct.Cl. 480; *Cramp Shipbuilding Co. v. United States,* 122 Ct. Cl. 72, 99; *Continental Illinois National Bank & Trust Co. v. United States,* 101 F.S. 755, 121 Ct. Cl. 203, 246; *Pottsville Casting & Machine Shops v. United States,* 101 F.S. 370, 121 Ct.Cll. 129; *Anthony P. Miller Inc. v. United States, supra.*" Certiorari denied, 75 S.Ct. 437, 348 U.S. 950.

The *Allied Contractors* case, *supra,* was followed more recently in *United States v. Adams,* 160 F.Supp. 143, where the District Court of Arkansas considered the question. The Contractor obtained a contract to manufacture wooden tent pins for the United States Army Quartermaster Department. The Contractor suffered certain losses on this contract because of unduly rigid inspection procedures practiced by a government inspector. In the meantime, the Contractor obtained another similar contract from a different Army Quartermaster Department. The Contractor was having some difficulty with its bank because of the loss being sustained on the first government contract. The Con-

tracting Officer handling the second contract wrote a letter to the Contractor notifying him that the second contract was being terminated because of the Contractor's default in that the Contractor was behind in his deliveries of tent pins and his company was in receivership under a mortgage foreclosure. The Contractor was also advised that if he was dissatisfied with the decision he could appeal to the Secretary of the Army in accordance with the disputes clause, however, the Contractor did not appeal from the decision of the Contracting Officer.

The principal questions of law involved in the case were passed upon by the court in connection with the disposition of a motion for summary judgment filed by the plaintiff. In passing on the motion for summary judgment, the court on June 8, 1957 wrote the attorneys for the parties a memorandum letter opinion giving the court's reasons for overruling the motion. In that letter the court made the following comments:

> "Gentlemen:
>
> "The briefs of the parties have been received, and plaintiff's motion for summary judgment is now ready for disposition. Plaintiff contends that the determination made by the Contracting Officer is final, particularly in view of the fact that defendant did not appeal to the Secretary of the Army. Defendant contends that the determination by the Contracting Officer is not final, and in any event that defendant has the right to show that the excess costs incurred by plaintiff was due to its own lack of diligence. The Court is of the opinion that plaintiff's motion for summary judgment must be

denied for two reasons: (1) the Contracting Officer's determination was one of law, and therefore not final; (2) even if the Contracting Officer's decision was final, defendant would be entitled to litigate the question of excess costs.

"It is now established that a decision of the head of any department or agency or his duly authorized representative in a dispute arising out of a contract entered into by the United States is not final if the decision is fraudulent, capricious, arbitrary, so grossly erroneous as to necessarily imply bad faith or is not supported by substantial evidence. 41 U.S.C.A. Sec. 321.

"41 U.S.C.A. Sec. 322 provides:

" 'No government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board.'

"These statutes were enacted to overcome the decision of the Supreme Court in *United States v. Wunderlich,* 342 U.S. 98, 72 S.Ct. 154, 96 L.Ed. 113, and to establish a uniform system of judicial review in such cases. *Valentine & Littleton v. United States,* 145 F.S. 952, 953, 136 Ct.Cl. 638. And the policy of the statutes should not be interpreted in a niggardly manner. *United States v. Lennox Metal Mfg. Co.,* 2nd Cir., 225 F.(2d) 302, 319; *United States v. T. W. Cunningham Inc.,* 141 F.S. 205, 207. However, the statutes were not intended to eliminate the necessity of contractors appealing decisions of contracting officers to the head of the department. See, Legislative News, p. 2196. As to questions of fact it is necessary for the contractors to appeal to the head of the department, unless the contracting officer makes it im-

possible for him to appeal as in the case of *United States v. Lennox Metal Mfg. Co.,* D.C. N.Y., 131 F.S. 717, 731, affirmed, 2 Cir., 225 F.(2d) 302. But as to questions of law, it is not always incumbent upon the contractor to appeal to the head of the department. See *Allied Contractors v. United States,* 124 F.S. 366, 129 Ct.Cl. 400, and cases therein cited. In the instant case, in the notice of termination the Contracting Officer, after stating that delivery of all of the pins had not been made stated: 'Inasmuch as your company is now in receivership under a mortgage foreclosure, it has been determined that you are unable to produce the balance due under the said contract. Therefore, it is the finding of the undersigned that your failure to deliver the balance of 253,900 each, Pins, within the time specified by the said contract is not due to causes beyond your control and without your fault or negligence within the meaning of General Provision 11 of the said contract, entitled "Default".'

"The only finding of fact made by the Contracting Officer was that defendant was in receivership under a mortgage foreclosure. The Contracting Officer then concluded as a matter of law that the failure of defendant to deliver the remaining pins was not due to causes beyond defendant's control and without fault or negligence within the meaning of the contract. The interpretation of the contract is a matter of law. *John A. Johnson Contracting Corp. v. United States,* 132 Ct.Cl. 645, 132 F.S. 698, 703. And, of course, the determination of whether defendant's failure was due to negligence is a matter of law. It follows that defendant is entitled to a judicial determination of this question * * *.

> "In view of the foregoing, an order is being entered today denying plaintiff's motion for summary judgment."

A similar matter was decided in *Halvorson v. United States,* 126 F.Supp. 898, 902 (D.C. Eastern District of Washington, Northern Division). The government plans, in that case, failed to provide shutters or protective coverings for ventilators in buildings being constructed for the government near Havre, Montana. Fine snow drifted through the openings into the attic area during construction and the Contractor was put to some extra expense in removing the snow, repairing and replacing damaged plastered walls and ceilings. The Contractor submitted a claim for additional expenses incurred to the resident engineer. It was denied because the official did not believe the contract provided for payment of such a claim. The contract required that all disputes concerning questions of fact must be decided by certain officials. The Contractor did not take any administrative appeal from the decision of the resident engineer or the Legal Division of the District Office. The court in that case said:

> "Moreover, the dispute on which the plaintiff's case was based, was not a dispute of fact or a dispute which involved the plans and specifications, but purely and simply a dispute on questions of law. The rejection letter mentions no factual dispute or issue, but, on the contrary, denies plaintiff's demand on a point of law, namely, that, as construed by the Legal Division of the District Office, plaintiffs were in effect insurers of the work until final acceptance by the United States * * *.

> "In the situation presented here, cases involving disputes clauses of government contracts, containing provisions that *all* disputes must be decided administratively, are not applicable. Where the disputes clause provides that disputes concerning questions of fact shall be decided by certain officers or agents of the government, and only questions of law involved, the contractor need not first exhaust his administrative remedies under the contract before instituting his court action."

How should the above decisions be applied to the questions raised in the instant case? The lower court said in its memorandum decision (R. 20):

> "While the *Allied Contractors* case may appear to support plaintiff's contention, it is my view that in so far as it does it is not in accord with the law as expressed by the Supreme Court in *United States v. Blair,* 321 U.S. 730, and *United States v. Holpuch Co.,* 328 U.S. 234."

First it should be pointed out that the *Blair* case was mentioned in the *Allied Contractors* case as being decisive where no appeal was taken from the Contracting Officer's decision but the Court of Claims held that under the facts it could not agree. The reason the *Blair* case was not followed in the *Allied Contractors* case nor should it be of any assistance in the case at hand, is because different versions of the disputes clause were being interpreted by the court. The disputes clause in *United States v. Blair,* 321 U.S. 730, reads as follows:

> "All disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30

> days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions."

The significant feature of the above disputes clause is that it related to "all" disputes, whether involving questions of fact or law. Such a disputes clause is no longer legal since it would be contrary to 41 U.S.C.A. Sec. 322 which states that government contracts shall not include provisions making the decision of administrative officers final on questions of law. The *Blair* case, as well as the *Holpuch* case, can only be cited as authority for the rule that one must exhaust his administrative remedies where questions of fact are involved, as distinguished from questions of law, a proposition we are all agreed upon. Since the court in the *Allied Contractors* case was considering a disputes clause relating solely to disputes of fact, a clause exactly like the one found in the matter before this court, the case should be followed unless it has not been overruled by more recent cases emanating from the Court of Claims or the United States Supreme Court.

The lower court went further in its memorandum decision and said (R. 20):

> "Further, it would appear that the Court of Claims in its more recent decisions has failed to follow the pattern of the *Allied Contractors* case; see *Henry E. Wile Company v. United States,* 169 F.S. 249 at page 252."

The facts in the *Henry E. Wile* case, 169 F.Supp. 249, *supra,* were as follows: During the course of its work plaintiff encountered subsurface conditions dif-

ferent from those shown on the drawings or indicated in the specifications. Plaintiff, on September 29, 1953, under clause 4 of the contract, which is entitled "Changed Conditions," made a claim to the Contracting Officer for increased costs due to changed conditions. This claim was denied by the Contracting Officer on March 22, 1954, on the ground that plaintiff had not given proper notice and the alleged condition did not constitute a changed condition. The plaintiff failed to appeal this decision and the claim was ultimately dismissed for failure to exhaust the administrative remedies.

It is immediately apparent that the Contracting Officer denied the claim in his letter of March 22, 1954, on a question of fact. It then became necessary to appeal this factual ruling. The court in the *Henry E. Wile* case followed the well established rule that a contractor, governed by a "question of fact" disputes clause, must appeal from an adverse decision of a Contractor, governed by a "question of fact" disputes clause, must appeal from an adverse decision of a Contracting Officer on a question of fact, thereby exhausting his administrative remedies, before the claim may be considered by a District Court or the Court of Claims.

On the other hand, there were three holdings in the *Allied Contractors* case pertinent for our discussion here: (1) the denial of a claim "on the grounds that it is in the nature of damages and therefore not compensable (administratively) under the contract" is a decision based on a matter of law, (2) where it is not

clear whether a letter of the Contracting Officer in denying a claim is based on a question of fact or law, then the court can look to the surrounding circumstances in making that determination. The court, in the *Allied Contractors* case found the second letter of the government dated August 26, 1949, to be ambiguous, considered the surrounding facts and determined the claim was denied on a question of law. And (3) the Contractor is not required to appeal from the Contracting Officer's decision based on a question of law.

The appellant contends that the decision in the *Henry E. Wile* case did not alter the pattern set by the *Allied Contractors* case but only reiterated a rule which is not in controversy here.

Finally, the trial court distinguished the *Allied Contractors* case from the problems here presented (R. 20). The court referred to that portion of the *Allied Contractors* case (R. 21) which held that the surrounding circumstances could be considered where an ambiguous letter was involved. The court did not take the next mandatory step and find the Contracting Officer's letter of March 31, 1958, to be ambiguous, that the surrounding circumstances reveal it was one based on a question of fact and therefore an appeal was mandatory.

Instead the court said (R. 22):

> "A contractor cannot hold the contracting officer's letter up in the abstract. He has to consider the nature of his claim. And, as here, if the surrounding circumstances indicate that the decision is based on facts as well as law appeal would be

necessary. The opinion of the contracting officer that the issue involved was one of law rather than fact does not make it such."

The appellant finds the above language confusing and inconsistent with the usual credence given to the decision of the Contracting Officer in determining claims involving government contracts. His decision is the crossroads for all claims against the government. If based on a question of law then the road leads to the proper court, otherwise on to the next administrative level. The trial court suggests that the Contractor must consider the surrounding circumstances and not the written decision of the Contracting Officer, in determining whether an appeal is required. Such a conclusion would place a heavy burden on a contractor attempting to weave his path through the administrative process.

The March 31, 1958, letter (Ex. I) of the Contracting Officer started out, "After careful review of the facts, . . ." and then compared the claim with the provisions of the contract. The interpretation of the contract was the substance of the letter. The Contracting Officer might have used an opening phrase, "After thinking the matter over carefully" and the meaning of the letter wouldn't have been changed in any respect. The appellant is at a loss in attempting to find wherein the letter was ambiguous.

Assuming, for the sake of argument, that the decision of the Contracting Officer was ambiguous, which the appellant denies, at what point of time should these surrounding circumstances be considered by the Con-

tractor in deciding where to proceed with a claim rejected by the Contracting Officer? Surely it could only be those circumstances existing at the time of the Contracting Officer's decision or earlier. What happened at a later time could not possibly be timely in this regard.

An examination of the facts reveals that the first time the government contended there was no unreasonable delay in making the inspection appeared in appellee's answer (R. 7, 8) to appellant's complaint. The only other mention of inspection is found in the letter of denial signed by the Officer in Charge of Construction, Thirteenth Naval District, dated January 28, 1958 (Ex. G) where he said:

> "It is desired to point out that time was required to accomplish the inspection to be performed by the Government as specified in paragraph 3.6 of the contract. Further, upon completion of the inspection by the diver, time was required to analyze his report and determine what repairs were necessary. Obviously, the above referenced paragraph 3.6 of the specifications has informed the contractor that a delay will occur after the ramp decks have been removed."

There has never been any question but that it would take time to make the inspection and analyze the results of same and paragraph II of the Stipulation (R. 23) reveals that the parties estimated that it would take 3 or 4 days to accomplish the inspection.

The vital question is whether it was unreasonable for the government to start the inspection and then

terminate it for 18 days because of insufficient funds which ultimately required the Contractor to shut down for 15½ days. Since the government never raised this factual issue until they answered appellant's complaint, this was not one of the surrounding circumstances which the trial court could consider in determining whether an alleged ambiguous decision rendered by a Contracting Officer involved a question of fact or law.

In all of the earlier letters of denial, found in Exhibits D and G, the government denied the claim because there was no provision in the contract which allowed compensation for government-caused delays. The government never contended that these were reasonable government-caused delays until suit had been commenced. Obviously whether or not such damages are recoverable under the contract is a question of law. Therefore, even if the Contracting Officer's letter of March 31, 1958, was ambiguous, the surrounding circumstances indicate the claim was nevertheless being denied on a question of law.

II.

The appellant also contends that it was not necessary to appeal from the adverse decision of the Contracting Officer because it was a claim for unliquidated damages, and as such, would have been subject to a motion for dismissal by the government if the claim had been appealed and presented to the appropriate Board of Contract Appeals. Although the trial court did not mention this theory raised in appellant's motion to reconsider, nevertheless, the appellant believes it is as

equally persuasive as the other arguments mentioned above.

It should also be discussed if the appellate court should find that the district court did not have jurisdiction over the matter but that the 30-day period for appeal was not applicable, hence an appeal now to the Secretary of the Navy would still be possible. A holding by the Board of Contract Appeals that it involved a claim for unliquidated damages over which they had no jurisdiction would leave the appellant without an administrative body or court from which to obtain relief.

In *Railroad Waterproofing Corp. v. United States,* 133 Ct.Cls. 911, 137 F.Supp. 713, the Contractor obtained a contract to do certain work based on erroneous government specifications. When the error was noticed the government agent requested that the additional work be done and the job was continued to completion. The Contractor subsequently submitted a claim to the Contracting Officer for extra work. The Contracting Officer made certain purported findings of fact and a decision rejecting plaintiff's claim. The court said:

> "The findings of fact and decision appear to have been a decision based solely on legal considerations. They recited the terms of the contract documents, found that no extra work, materials or changes had been ordered by the Contracting Officer, stated that any work performed by the contractor in variance with or in addition to the contract was performed at its own risk and without order from the Contracting Officer, and decided

> that no amount was due the plaintiff over and above the unpaid balance of the contract price. The Contracting Officer failed to make any findings as to the extra work plaintiff had to do on account of the lineal measurements. The covering letter for Mr. Stone's finding of fact and decision called attention to the 'Disputes' clause of the contract and advised that any appeal should be made to the Board of Contract Appeals."

The Contractor failed to appeal the decision within 30 days as required by the disputes clause for questions of fact. The government raised the point that the Contractor was precluded from seeking relief in this court because it has not exhausted its remedies under the disputes clause of the contract and referred to the 30-day requirement. The court commented again:

> "Were this a matter over which the Contracting Officer or the Secretary of War had authority, we might agree with defendant's contention. But the claim is one for unliquidated damages. Over such claims the executive departments decline to exercise jurisdiction on the ground that they are not within their authority. *Continental Illinois National Bank v. United States,* 101 F.S. 755, 121 Ct.Cl. 203; *Pottsville Casting & Machine Shop v. United States,* 101 F.S. 370, 121 Ct.Cl. 129; *Anthony P. Miller v. United States,* 77 F.S. 209, 111 Ct.Cl. 252. Since the Contracting Officer had no authority to decide a claim of this kind it was not necessary to appeal from his decision. *Pottsville Casting & Machine Shops v. United States, supra; Anthony P. Miller v. United States, supra;* see also *Allied Contractors Inc. v. United States,* 124 F.S. 366, 129 Ct.Cl. 400."

This matter had been discussed earlier in the case of *Langevin v. United States,* 100 Ct.Cls. 15, 30, where the court said:

> "Congress has conferred exclusive jurisdiction on this court, and in certain cases on the district courts, to decide claims against the Government. It has consented to be sued only in these forums. Can, then, some agent of the Government other than Congress validly contract that someone other than this court or a district court may finally determine the facts upon which liability of the defendants rests? Ordinarily, when the facts are once found, the case has been nine-tenths decided. Since Congress has vested in this court and in the district courts exclusive jurisdiction of cases against the Government, it is not to be presumed that the parties intended that some other tribunal should make findings of fact that would be binding on us. If they did, their agreement would be in violation of the Act of Congress vesting jurisdiction in this court and the district courts, and therefore void.
>
> "We have consistently held that neither article 9 nor article 15 of the Standard Government Contract gives the contracting officer the power to determine a contractor's claim for damages for delay. See *Phoenix Bridge Co. v. United States,* 85 Ct.Cls. 603, 629, and *Plato v. United States,* 86 Ct. Cls. 665, 677. See also *United States v. Rice and Burton, Receivers,* 317 U.S. 61, 67.
>
> "In a suit against the United States for damages for delay, we do not think the contracting officer's findings of fact on the cause or extent of delay are conclusive."

An example of what might have happened to the ap-

pellant's claim even if it had been appealed to the Board of Contract Appeals is found in Paragraph 1972—*Gustave Hirsch Organizations, Inc.,* which was a hearing before the Board of Contract Appeals, cited 58-2 BCA, October 30, 1958.

The appellant filed an appeal from a letter decision of the Contracting Officer which dismissed five claims for additional compensation as being claims for unliquidated damages, based upon alleged delays by the government in meeting its obligations under the contract, which he had no authority to entertain and settle under the terms of the contract.

There was some discussion over the fact that the appellant hadn't appealed within the 30 days as required by the disputes clause but then the Board went on to say:

> "It seems to the Board that the motion to dismiss for lack of jurisdiction should be granted in the instant case, although not on the ground advanced by the Government. Paragraph 23 of the Special Conditions of the specifications provided that certain materials described therein would be furnished by the Government for use by the contractor in performance of work under the contract, and set forth an 'estimated delivery date' for most of the categories of materials described. Other provisions of the specifications provided for the furnishing or approval by the Department of drawings for use by the contractor in performing the contract work. The instant claims, which are based solely on the alleged unreasonable or otherwise improper delays of the Government in furnishing certain of the materials and drawings, would not,

if proven, come within the purview of any of the contract provisions, such as the 'changes' and 'changed conditions' clauses, that permit the allowance of equitable adjustments in the contract price by administrative action, but would amount to claims for damages for breach of contract. It is well settled that claims of this type are beyond the jurisdiction of either the contracting officer or the Board to consider and settle such a contract as the present. * * * This is the only valid reason, however, for the Board's lack of jurisdiction. The scope of the 'disputes' clause is limited by its own terms to disputes 'concerning a question of fact arising under this contract.' In the appeal of D. R. Haddox, IBCA-84 (July 19, 1957) the Board held that an appeal relating to a matter outside the 'disputes' clause was not subject to the 30 day limitation and the rationale of that decision is equally applicable to cases involving only questions of law. The question presented in the instant case, is, of course, one of law."

The court's attention is directed to the letter of the Officer in Charge of Construction, Thirteenth Naval District, dated January 28, 1958 (Exhibit G), wherein he said:

"In the absence of a contract provision which would enable the Contracting Officer to make an adjustment in contract price because of delays occasioned by the Government, and for standby and other additional costs incurred as a result thereof, the Officer in Charge of Construction is not given authority to make such an adjustment in the contract price."

Such a statement indicates the government didn't

believe the claim could be settled administratively. See also *Torres v. United States,* 126 Ct.Cls. 76; *Ross and Co. v. United States,* 126 Ct.Cls. 323, 112 F.Supp. 363; *F. H. McGraw & Co. v. United States,* 131 Ct.Cls. 29, 130 F.Supp. 394; *Silberblatt & Lasker Inc. v. United States*, 101 Ct.Cls. 54, 80.

United States Army and Air Force construction contracts contain a "Suspension of Work" clause under which a suspension of work of unreasonable duration becomes the basis of a claim arising under the contract, and this clause has been interpreted to cover, not only cases where the contractor has been ordered to stop work, but also cases where the contractor is forced to stop work as a result of acts or omissions of the Government. Navy construction contracts do not contain such a clause, and as a result, Navy construction contractors, such as appellant, must still sue in the Court of Claims or district courts to recover damages for unreasonable delays caused by the Navy on construction projects.

CONCLUSION

The decision of the Contracting Officer in his letter of March 31, 1958, was based on a question of law, therefore, an appeal was unnecessary and appellant was entitled to have the matter heard in an appropriate district court.

Even though an appeal is held to be required from an adverse ruling on a question of law, the 30 day period relating to questions of fact is not applicable and

an appeal may still be taken to the Secretary of the Navy within a reasonable time.

Although the Contracting Officer's written decision may have been ambiguous, the surrounding circumstances still indicate the decision was based on a question of law.

In any event, the claim was one for unliquidated damages and outside the authority of the Contracting Officer or other executive officers, and therefore a proper subject of jurisdiction for a United States District Court to entertain.

Respectfully submitted,

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